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FEATURE COMMENT: The New A-76—OMB Adopts Familiar FAR Framework For Public-Private Competitions

On May 29, 2003, the Office of Management and Budget issued the long-awaited revised OMB Circular A-76. See 45 GC ¶ 223. The Circular establishes federal policy for the competition of commercial activities between the public and private sectors. The overhauled Circular is the culmination of a two-and-a-half-year process that began when Congress directed the Comptroller General to convene a Commercial Activities Panel to study the policy and procedures governing the outsourcing of commercial activities. The prior Circular had been subject to a growing chorus of criticism from nearly all quarters, both public and private. Following the release of the Commercial Activity Panel's April 30, 2002 report, which recommended fundamental changes to the A-76 process, OMB proceeded to draft a revised Circular that implements most of the Panel's recommendations and substantially recasts long-standing A-76 procedures. Most significantly, the new Circular now incorporates familiar Federal Acquisition Regulation-type principles and procedures to provide greater uniformity in the treatment of public and private sector offerors. The result is that the A-76 process will now resemble a FAR competitive procurement and the Government employee organization will, in theory, largely be treated as if it is simply another commercial offeror.

This FEATURE COMMENT summarizes the most significant changes to the Circular and discusses several issues raised by the new procedures, including those relating to the revised rules for contesting A-76 competitions. The revised Circular is available on OMB's web page at *http://www.whitehouse.gov/omb/circulars/a076/a76_rev2003.pdf*.

Scope of Revised Circular—The revised Circular, which took effect on May 29, 2003, applies to most federal agencies, including the military departments. Except for certain competitions currently in progress, the revised Circular supersedes the prior Circular, its companion Revised Supplemental Handbook, and related OMB guidance. Under the new A-76 procedures, agencies may conduct either a "standard competition" or a "streamlined competition," although agencies have flexibility in the selection of specific procedures within each of those two categories. "Direct conversions" are no longer authorized, except to the extent that they may be statutorily required or permitted. If an agency wishes to deviate from the revised Circular, it is required to obtain OMB's approval. Agencies are encouraged, however, to use this "deviation procedure" to explore innovative alternatives, such as public-private partnerships.

Significantly, the revised Circular states that, before Government personnel may perform a new requirement, an expansion to an existing commercial activity, or an activity performed by the private sector, an A-76 competition must be conducted. In contrast, an A-76 competition is not required for private sector performance of a new requirement, private sector performance of a segregable expansion to an existing commercial activity performed by Government personnel, or continued private sector performance of a commercial activity. See Circular A-76 at ¶ 5(d). This distinction reflects a preference for private sector performance of segregable commercial activities that are not currently being performed by Government employees.

Commercial Activities Inventories—Before an agency can conduct an A-76 competition, it must, pursuant to the Federal Activities Inventory Reform (FAIR) Act of 1998, first determine which activities currently performed by Government personnel are

suitable for competition and potential private sector performance. The revised Circular contains refined and expanded guidance covering annual agency inventories of commercial activities (activities that could be performed by the private sector) and "inherently governmental activities" (activities that are so intimately related to the public interest as to mandate performance by Government personnel) that are currently performed by Government personnel. See Circular A-76, Attachment A. For example, the Circular now requires agencies to choose one of six reason codes to explain why Government personnel are presently performing a commercial activity, and to provide a written justification for designating such an activity as not appropriate for private sector performance. The Circular also requires agencies to implement an inventory challenge process which, in accordance with the FAIR Act, permits interested parties (including persons from both the private and public sectors) to submit an inventory-related challenge within 30 working days after an inventory becomes publicly available. Such challenges are limited, however, to those regarding the reclassification of an activity as commercial or inherently governmental and the application of reason codes. See Circular A-76, Attachment A at § D.2.

Because the classification of an activity as commercial or inherently governmental is a critical first fork in the road to, or away from, an A-76 competition and possible outsourcing, and because the Bush Administration has made its "competitive sourcing initiative" a top priority, the agency inventory process is becoming an early battlefield in the A-76 process. Indeed, two lawsuits brought on behalf of federal employees have already been filed challenging the revised Circular's inventory procedures. See *National Treasury Employees Union v. U.S. Office of Management and Budget*, No. 1:03CV01339 (D.D.C. Jun. 19, 2003), 45 GC ¶ 257; *American Fedn. of Govt. Employees v. Styles*, No. 2:03-cv-03944-HB (E.D. Pa. Jul. 2, 2003), 45 GC ¶ 270(f). Both suits allege that the revised Circular's inventory procedures conflict with the FAIR Act concerning the discretion that federal employees must exercise for their functions to be deemed inherently governmental, the types of functions that may be deemed inherently governmental, and the scope of the challenges that may be brought to agency designations of activities as commercial or inherently governmental. As with other recent A-76-related lawsuits brought by or on behalf of federal employees, a key preliminary issue will be whether such plaintiffs have standing to raise such claims.

Competition Time Limits—One controversial aspect of the revised Circular is the requirement that A-76 competitions be completed within a relatively short period. The Circular now requires agencies to conduct standard competitions within 12 months after public announcement of the competition, although this period may be extended up to six months in certain circumstances. If an agency exceeds this time limit, however, the revised Circular provides only that the agency must notify OMB in writing. See Circular A-76, Attachment B at § D.1. Streamlined competitions, which are more informal, must be completed within 90 days after public announcement; this period may in certain circumstances be extended up to 45 days. If an agency cannot complete an announced streamlined competition within this time limit, it is required to either convert the streamlined competition to a standard competition or, using the deviation procedure, request an additional extension of time from OMB. See Circular A-76, Attachment B at § C.2. The imposition of these time limits may help curb the delays that have plagued many recent A-76 competitions. However, particularly where a standard competition is large, complex, or contentious, agencies may find the 12-month time limit difficult to meet.

Standard Competitions—The previous Circular provided for a "two-step" A-76 competition process: in the first step, commercial offerors competed amongst themselves in an initial round in which the agency selected a private sector offer; in the second step, the chosen private sector offer and the Government's in-house proposal were subjected to a "cost comparison" to determine who, based purely on lowest estimated cost, would be selected for performance. This two-step process was criticized as often failing to yield an apples-to-apples cost comparison between the commercial and in-house proposals—particularly in those competitions where the initial round of competition between the com-

mercial offerors was conducted on a best value basis. See McCullough, Melander, & Alerding, FEATURE COMMENT: "Year 2001 OMB Circular A-76 Cost Comparison Developments," 44 GC ¶ 1.

The revised Circular's standard competition process does away with this two-step process. Instead, through the implementation of FAR-like principles and procedures, there will now be a single competition with the Government employee organization generally being treated as if it is simply another commercial offeror.

• *Types of Standard Competitions*—An agency may select one of four standard competition variants. In each competition, all offers, including the Government employees' "agency tender," will be evaluated together. The four standard competition variants include a sealed bid acquisition conducted in accordance with FAR Part 14 and three types of negotiated procurements conducted in accordance with FAR Part 15. See Circular A-76, Attachment B at § D.5. The three types of negotiated procurements are (1) lowest price technically acceptable source selections, (2) phased evaluation source selections, and (3) tradeoff source selections. In a phased evaluation source selection, the agency will evaluate technical capability in phase one and cost in phase two. This two-phase process allows offerors to propose alternate performance standards, which, if accepted by the agency, will result in a solicitation amendment and a request for the resubmission of offers and agency tenders. Under this method, the performance decision is based upon the lowest cost of all technically acceptable offers and tenders. In a tradeoff source selection, the agency may make tradeoffs among cost/price and non-cost/price factors when it is in the best interest of the Government to consider award to other than the lowest-cost/priced source. Use of a tradeoff source selection process, however, is limited to procurements involving information technology activities, commercial activities currently performed by the private sector, new requirements, and segregable expansions, or where the appropriate agency official otherwise authorizes the use of such a process and notifies OMB.

• *Application of Solicitation to Agency Tender*—Unlike the previous Circular, the revised Circular provides that solicitations will govern the Government employees' participation in an A-76 competition. See Circular A-76, Attachment B at § D.3. Therefore, like private sector offerors, the Government employee organization will now be required to submit its offer before the solicitation closing date. The agency tender also will be required to respond to most solicitation requirements, including those contained in the solicitation's instructions, conditions, and notices to offerors ("section L"), and evaluation factors for award ("section M"). However, due to the noncommercial nature of a Government employee organization, an agency tender is not required to include certain items that a private sector offer may be required to include, such as a labor strike plan, a small business strategy, a subcontracting plan goal, participation of small disadvantaged businesses, and licensing or other certifications. The agency tender also is not required to include past performance information, unless the tender is based upon a Government employee "Most Efficient Organization" that won a prior A-76 competition for the activity in question.

• *Discussions and Clarifications*—Agencies may, in accordance with FAR procedures, conduct exchanges with offerors, including the Government employee organization through its "Agency Tender Official." See Circular A-76, Attachment B at § D.5.c.(2). Significantly, the revised Circular provides that, as with private sector offers, agency tenders may be excluded from a standard competition where they are materially deficient and such deficiencies are not, or cannot be, timely corrected. See Circular A-76, Attachment B at § D.5.c.(3). The ability of agencies to thus exclude a technically unacceptable in-house proposal from an A-76 competition represents a major change from the previous Circular, which required agencies to adjust otherwise unacceptable in-house proposals to include adequate staffing or other resources until all performance requirements were satisfied. See *Pacific Support Group, LLC*, Comp. Gen. Dec. B-290467, 2002 CPD ¶ 142 (noting that, under the previous Circular, the concept of technical unacceptability did not apply to in-house proposals). The revised Circular further provides that, after the closing date, changes to an agency tender are limited to those responding to solicitation amendments, requests for final proposal

revisions, official changes to standard cost factors identified in the Circular or official costing software, or resolutions of "contests" challenging an A-76 performance decision. See Circular A-76, Attachment B at § D.4.

• *Price Analysis and Cost Realism*—The revised Circular requires agencies to perform price analysis and cost realism on all proposals, including agency tender cost estimates. See Circular A-76, Attachment B at § D.5.c.(4). In doing so, agencies must ensure that agency tender cost estimates are calculated in accordance with the Circular's detailed guidance for the calculation of performance costs, which is very similar to the previous Circular's costs calculation guidance. See Circular A-76, Attachment C. Due to the very different ways in which Government agencies and commercial sources consider and account for costs, calculation of the estimated cost of Government employee performance has been, and likely will remain, a contentious area.

• *Standard Competition Form*—One of the final steps of the standard competition process is the completion of the Standard Competition Form. Like the previous Circular's Cost Comparison Form, the Standard Competition Form contains various line items for the calculation, adjustment, and comparison of public and private sector performance costs. There are, however, a few notable changes to the Circular's guidance for the calculation of costs. For example, the previous Circular left to agencies' discretion the calculation of the "one-time conversion costs" that are added to the cost of private sector performance to account for certain costs the Government will incur as a result of conversion from in-house to commercial performance. As a result, the calculations of such subjective costs frequently have been challenged. See, e.g., *Trajen, Inc.*, Comp. Gen. Dec. B-284310 et al., 2000 CPD ¶ 61, 42 GC ¶ 139 (chastising agency for repeatedly adjusting federal employee relocation costs, to the contractor's detriment, during the course of an Administrative Appeal and subsequent protest). To prevent such disputes, the revised Circular now provides that all one-time conversion costs are calculated simply as 5% of the Government employee organization's personnel costs for the first period of full performance. See Circular A-76, Attachment C at § C.4. Similarly, regarding the contract administration costs that are added to the estimated cost of private sector performance, the revised Circular avoids potential disputes by now identifying the specific personnel grades to be used in calculating the labor costs for each of an agency's contract administrators. See Circular A-76, Attachment C at § C.2; *Del-Jen, Inc.*, Comp. Gen. Dec. B-287273.2, 2002 CPD ¶ 27, 44 GC ¶ 95 (concluding that the agency had inflated the number and grade of personnel required to administer a contract).

• *Conversion Differential*—Like the previous Cost Comparison Form, the revised Circular's Standard Competition Form continues to include a "conversion differential." The differential is a significant cost—calculated as the lesser of $10 million or 10% of total proposed in-house personnel costs—that usually is added to the estimated performance cost of non-incumbent sources. However, as a reflection of the Government's preference for private sector performance of segregable commercial activities that are not currently being performed by Government employees, agencies are now required, for new requirements or expansions to existing commercial activities, to add the differential to the estimated cost of Government employee performance—even though there is no incumbent source for such work. See Circular A-76, Attachment C at § D.

• *Debriefings*—Following the public announcement of a performance decision, the revised Circular requires agencies to offer debriefings to all offerors, including the Agency Tender Official and directly affected federal employees. See Circular A-76, Attachment B at § D.6.d. Consistent with the intent to treat the Government employee organization like a private sector offeror, the revised Circular also provides that, until resolution of any A-76 contest or expiration of the time for filing a contest, only "legal agents" for directly interested parties may have access to the Standard Competition Form and the agency tender, and only upon signing a non-disclosure agreement. See Circular A-76, Attachment B at § D.6.e. This represents a significant change because, under the previous Circular, agencies typically freely released to private sector offerors the Cost Comparison Form as well as the in-house proposal immediately following announcement of a perfor-

mance decision. Indeed, detailed review of the in-house proposal, including the in-house cost estimate and plan for satisfying performance requirements, often yielded most of the grounds for challenging a decision favoring in-house performance. Since, as discussed further below, the time period for filing an A-76 contest has now been significantly shortened, these new restrictions on access to such information may hamper the ability of private sector offerors to timely challenge A-76 performance decisions.

• *A-76 Contests*—The prior Circular provided for an agency-level A-76 Administrative Appeals process in which interested parties, including federal employees and their representatives, could challenge various aspects of an agency's cost comparison decision. The revised Circular scraps the Administrative Appeal process. Instead, the Circular now states that directly interested parties may pursue A-76-related "contests" using the agency-level protest procedures of FAR Subpart 33.103. See Circular A-76, Attachment B at § F. Directly interested parties are defined to include private sector offerors, the Agency Tender Official, and a single individual appointed by a majority of directly affected employees. Significantly, the range of issues that may be contested under the revised Circular are much broader than those that could be raised under the previous Circular. Contest issues now include those regarding the solicitation (including solicitation cancellation), the exclusion of an offer or tender from a competition, compliance with the Circular's costing provisions, the evaluation of offers and tenders, and other performance decision improprieties. In addition, by incorporating the FAR's agency-level protest procedures, the revised Circular significantly shortens the period interested parties have to file an A-76 contest. Under the previous Circular, interested parties had 20 days (or 30 days in complex cost comparisons) to file an Administrative Appeal. Under FAR Subpart 33.103, protests must be filed no later than 10 calendar days after the basis of protest is known or should have been known, except where protests are based on alleged apparent improprieties in a solicitation, which must be filed before bid opening or the closing date for receipt of proposals.

• *Post-Competition Accountability*—The revised Circular's treatment of the Government employee organization like a private sector offeror does not end with a performance decision. If the in-house employees win a competition, the agency is required to establish a "letter of obligation" with the Government employee organization. See Circular A-76, Attachment B at § D.6.f.(3). Similar to a contract with a private sector offeror, the letter of obligation must incorporate appropriate portions of the solicitation and the agency tender. In addition, regardless of whether performance will be by a public or private sector source, agencies are required to monitor performance, collect and report performance information for purposes of past performance evaluations in follow-on competitions, make option year exercise determinations, and issue cure and show cause notices, and terminate contracts or letters of obligation consistent with the FAR. See Circular A-76, Attachment B at § E. Significantly, the revised Circular also requires agencies to conduct periodic recompetitions of commercial activities even where the Government employee organization wins a competition. See Circular A-76, Attachment B at § E.5.b.

Streamlined Competitions—The other type of competition under the revised Circular is a "streamlined competition." Agencies may only conduct a streamlined competition if the commercial activity involves 65 or fewer federal employees ("full-time equivalents"). See Circular A-76, Attachment B at § A.5. To conduct such a competition, an agency must calculate and certify the estimated cost of in-house performance; there is no agency tender, although the development of a Most Efficient Organization or other more efficient organization is encouraged. The agency also must determine an estimated cost of private sector performance through documented market research or soliciting cost proposals. Based upon this information, the agency then completes a Streamlined Competition Form. The Streamlined Competition Form does not include all of the costs that are required on the Standard Competition Form, including the conversion differential and one-time conversion costs. The agency's performance decision is based upon lowest estimated cost. If it concludes that Government employee performance would be cheaper, the agency executes a letter of obligation. If it concludes that commercial performance would be cheaper, the agency may then

issue a solicitation and conduct a competition among private sector offerors. See Circular A-76, Attachment B at § C.

Notably, the revised Circular expressly states that "[n]o party may contest any aspect of a streamlined competition." See Circular A-76, Attachment B at § F. Although this prohibition forecloses agency-level A-76 contests, it is unclear as to whether a streamlined competition still may be challenged at the U.S. General Accounting Office or in the federal courts.

Conflicts of Interest—The specter of conflicts of interest is a unique concern in an A-76 competition because, while Government employees or consultants are involved in the creation of a solicitation and associated documents as well as the evaluation of proposals, a Government employee organization is an offeror. As a result, recent years have seen a series of bid protests involving alleged conflicts of interest in A-76 competitions. See, e.g., *Dept. of the Navy—Reconsideration*, Comp. Gen. Dec. B-286194.7, 2002 CPD ¶ 76, 44 GC ¶ 223; *DZS/Baker LLC*, Comp. Gen. Dec. B-281224 et al., 99-1 CPD ¶ 19, 41 GC ¶ 87. The revised Circular contains several new provisions to help preclude such potential conflicts. For example, the Circular now provides that, in standard competitions, members of the team that develops the Performance Work Statement (which is part of the solicitation) may not be members of the team that develops the Government employee Most Efficient Organization upon which the agency tender is based. See Circular A-76, Attachment B at § D.2.a. In addition, directly affected Government personnel (defined as personnel whose work is being competed) may not participate "in any manner" on the Source Selection Evaluation Board, nor may any person who has previous knowledge of the agency tender. See Circular A-76, Attachment B at § D.2.c. Regarding streamlined competitions, the revised Circular directs agencies to establish a firewall between the individual(s) preparing the in-house cost estimate and the individual(s) preparing the private sector cost estimate. See Circular A-76, Attachment B at § C.1.d.

Standing of Federal Employees at GAO and in the Federal Courts—Despite repeated attempts, federal employees and their representatives generally have been unable to obtain review of A-76-related complaints outside of the agency-level A-76 Administrative Appeals process. See McCullough, Melander, & Alerding, FEATURE COMMENT: "Year 2002 OMB Circular A-76 Cost Comparison Developments," 45 GC ¶ 1. Although the revised Circular does not address the possibility of contesting A-76 competitions at GAO or in the federal courts, the Circular's new treatment of Government employee organizations like commercial offerors, and standard competitions like FAR-type competitive procurements, may provide a basis for GAO or the courts (in particular, the U.S. Court of Federal Claims) to grant standing to such would-be plaintiffs. See, e.g., *Federal Prison Indus., Inc.*, Comp. Gen. Dec. B-290546, 2002 CPD ¶ 112, 44 GC ¶ 284 (stating that the mere fact that an intra-governmental transfer is different from a traditional contract is not a sufficient basis for finding that Federal Prison Industries is not an interested party under GAO's bid protest regulations). As a result, GAO on June 13, 2003 issued a Federal Register notice seeking comments regarding the effect of these Circular changes on GAO's bid protest procedures, including whether federal employee representatives should now be granted "interested party" status with standing to bring A-76-related bid protests to GAO. See 45 GC ¶ 244. If Government employee organizations are, like private sector offerors, deemed to have standing to challenge A-76 competitions at GAO or in the courts, the number of A-76 bid protests is likely to increase significantly.

Exhaustion of Administrative Remedies—The revised Circular also does not address whether interested parties *must* pursue agency-level A-76 contests before they may bring bid protests to GAO or the U.S. Court of Federal Claims. Under the previous Circular, GAO required private sector offerors to file A-76 Administrative Appeals raising any cost comparison issues that they knew or should have known about before bringing a subsequent protest regarding those issues to GAO. See *BAE Sys.*, Comp. Gen. Dec. B-287189 et al., 2001 CPD ¶ 86, 43 GC ¶ 210. Application of such an exhaustion doctrine may not be appropriate, however, under the revised Circular's contest procedures, which now cover a much broader range of contest grounds than were encompassed by the previous A-76 Administrative Appeals cost com-

parison challenge process. Indeed, under the previous Circular, commercial offerors were permitted to bring directly to GAO or the U.S. Court of Federal Claims many of the issues now covered by the new A-76 contest procedures, such as challenges to solicitation provisions and agency evaluations of proposals. It also should be noted that FAR 33.103 provides that pursuing an agency-level protest does not extend the time for obtaining a stay at GAO, although agencies may agree to a voluntary suspension period when agency-level protests are denied and the protester subsequently files at GAO. Therefore, if GAO requires protesters to exhaust the agency-level A-76 contest procedures before turning to GAO, the automatic stay of contract performance may no longer be available during the subsequent GAO protest.

GAO's June 13 Federal Register notice, mentioned above, also seeks comments regarding this exhaustion issue. It thus appears that GAO may shortly resolve this and other similar procedural issues through revisions to its bid protest procedures or the issuance of other guidance.

Conclusion—The revised Circular's adoption of FAR-like principles and procedures represents a significant and much-needed improvement in public-private competitions. While commercial offerors previously scrimmaged amongst themselves to determine who would compete head-to-head with the in-house employees under the often different rules of a cost-only comparison, the Government employee organization will now compete side-by-side with the private sector in a one-step process under which all offerors are in principle subject to the same rules. Although several issues still need to be resolved, the new Circular appears to provide an effective means through which a truly level playing field may finally be achieved.

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